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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

MARIA DEL ROCIO GARCIA, Petitioner, v. THE SUPERIOR COURT OF SAN JOAQIN COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C069450 (Super. Ct. No. SF115022A)

In this writ proceeding, we hold the magistrate improperly held petitioner Maria Del Rocio Garcia to answer for two of the eight grand theft charges pled against her. As we will explain, the magistrate should have dismissed those two counts because the hearsay statements made by declarants employed by the companies that petitioner did business with were unreliable. As to those two counts, the declarants lacked personal knowledge of

the business transactions. The testifying officer who recounted the hearsay was not able to describe in meaningful detail the circumstances under which the declarants' hearsay statements were made (for example, the officer could not remember the names of the declarants or the positions they held in the companies). And there was nothing else to bolster the reliability of the declarants' statements. As we will further explain, the magistrate properly held petitioner to answer for the remaining counts because, contrary to petitioner's argument, there was sufficient evidence petitioner took money belonging to the companies and she specifically intended to deprive them of their money.

FACTUAL AND PROCEDURAL BACKGROUND

A

Overview Of The People's Case At The Preliminary Hearing

This case involves business transactions between car wholesalers, used car dealers such as petitioner, and lenders who help consumers purchase cars from the dealers. In these transactions, the wholesaler sells a car on credit to a used car dealer. The wholesaler transfers possession of the car to the used car dealer and executes a contract with the used car dealer ensuring the wholesaler will be paid when a consumer buys the car. After a consumer agrees to buy a car from the used car dealer, the consumer borrows money from a lender. The lender then pays the used car dealer directly and the consumer takes possession of the car. The used car dealer then pays the wholesaler.

The People's theory of the case presented at the preliminary hearing was that petitioner received money from lenders but then did not pay the wholesalers, so the wholesalers did not give title to petitioner, and petitioner could not give title to the lenders. In this way, petitioner stole from both the wholesalers and the lenders.

To support their theory of the case, the People called as witnesses two wholesalers (Gurpreet Dhatt of West Coast Motors and Tom O'Neill of Valley Motors), one lender (Dawn Marie Zarate of Lobel Financial Corporation), and an investigator from the Department of Motor Vehicles (DMV), Christina Benafield, who had been a peace officer for eight years. Benafield in turn testified about conversations she had with two wholesalers (Jeff Brasher of Brasher Auto Auction and Mahmoud Alameddin Daoud of Northbay Motors), and three lenders (a gentleman from County Financial, Brenda from Credit West, and Mark Garaman from Rudolph Inc.)

B

Testimony At The Preliminary Hearing

Benafield began investigating petitioner in July 2007 when Benafield received a complaint from lender Rudolph Inc. that it had never received title for vehicles it had purchased from petitioner's used car sales business US Auto (count 8). Benafield then spoke with Mark Garaman. According to Benafield, Garaman said he was employed by Rudolph Inc. Garaman "probably" told Benafield his specific job title, although Benafield "just d[id]n't recall exactly what it is." She discussed with Garaman

a list of vehicles that Rudolph Inc. had originally submitted to DMV as part of its complaint. Garaman provided her with a list of vehicles for which he still did not have title, along with the contracts for each one of those vehicles, as well as copies of the canceled checks the consumers had paid to US Auto for their vehicles. This list included information on the specific make and year of cars, dates when the cars were sold, the name of the purchaser, and the amount for which Rudolph Inc. financed the car. The list covered 11 cars in the first quarter of 2007 and one in the second quarter. In Benafield's estimation, Rudolph Inc. financed "roughly around 35 vehicles" but Benafield "couldn't tell . . . exactly how many." Garaman gave her a dollar figure of the loss Rudolph Inc. suffered although Benafield did not know what that was "off the top of [her] head." The numbers Benafield testified to added up to $16,378.89, although that figure did not include all the numbers Garaman provided her. Garaman said Rudolph Inc. requested from petitioner the titles for these cars.

Following Rudolph Inc.'s complaint, Benafield visited petitioner at US Auto later in July 2007. Benafield told petitioner DMV had been receiving complaints of titles that were still outstanding to Rudolph Inc. Petitioner said she did not have the files with her so she could not speak about each of the cars individually. They set up an appointment so petitioner could come into DMV and explain the status of each of the vehicles.

At that meeting in August 2007, petitioner's files showed that only four of the 36 titles pertaining to the Rudolph Inc. transactions had been transferred. Petitioner said there were other wholesalers that had titles to vehicles for which she still had not paid, including Valley Motors, West Coast, Northbay Motors, and Brashers Auction. She explained the Board of Equalization had revoked her seller's permit, then DMV revoked her dealer's license, then she filed bankruptcy, and upon filing bankruptcy, the Board of Equalization reinstated her seller's permit, which allowed her to regain her dealer's license. She said her business practice was going to change, and she would no longer sell vehicles without first having title in hand.

In October 2007, DMV received more complaints about petitioner. A second lender, Lobel Financial, came forward (count 7). Dawn Marie Zarate was the branch manager for Lobel Financial Corporation. Zarate testified that part of her duties included purchasing vehicle loans from dealerships. US Auto was doing business with Lobel Financial in 2006 and 2007. Their business relationship started to unravel about one year before US Auto went out of business. US Auto began transferring titles later and later to Lobel Financial, there were more defaults, and customers began surrendering their cars to Lobel Financial. When Zarate confronted petitioner, she gave various reasons: "[s]he was waiting for title from auction. She . . . needed additional paperwork. There was always a lot of reasons why she would need additional time to transfer title through DMV, but

then would ultimately come through." When US Auto went out of business, the titles stopped coming through. Lobel Financial had 13 cars for which they had no titles, so Lobel had to buy back those titles from the wholesaler for $98,736. It was the biggest loss Lobel Financial had ever suffered because of a dealer.

Benafield also contacted the wholesalers petitioner had mentioned and asked them if they could provide Benafield with information about the vehicles they had sold to US Auto.

One of the wholesalers Benafield contacted was Brasher's Auto Auction (count 1). Benafield testified she telephoned Jeff Brasher, the owner of Brasher's Auto Auction. She did not recall the exact date, but it was "probably about the time that [she] received Lobel's complaint." Brasher told her that US Auto purchased vehicles from Brasher Auto Auction and provided her with a list of vehicles he had sold to US Auto but to which he still held title because he had not been paid. The list included the car's make and model, sale date for each car, and the amount due (i.e., the amount for which he sold the car). For example, there was a Ford Expedition sold to US Auto in March 2007 for $9,910. Brasher told her the total amount of money US Auto had failed to pay him was $49,645. Brasher told her the data was accurate, although he did not tell her who prepared it or how it was prepared.

Another of these wholesalers was Northbay Motors (count 2). Northbay Motors was a vehicle wholesaler owned by Mahmoud Alameddin Daoud. Benafield telephoned Daoud because she knew

from talking to petitioner that Daoud had some titles for vehicles for which petitioner had not paid him. According to Benafield, Daoud said he wholesaled eight vehicles to US Auto for which US Auto had not paid, and so he was still in possession of those titles. She asked him to "prepare a list or provide [her] with a list" of those vehicles, including the amount for which he sold the cars to US Auto. Daoud told her to contact his accountant. Benafield contacted accountant Ed Randolph and asked him to prepare a list of the vehicles that were wholesaled to US Auto to which Daoud was still holding title. Randolph complied. Benafield then contacted Daoud again and asked him to provide her the dollar amounts for which he had sold each of these vehicles to US Auto. They "went on the phone one by one and he told [her] how much each vehicle he had sold to [US Auto cost]." The total amount was $53,000.

A third wholesaler Benafield contacted was Valley Motors (count 3). Tom O'Neill was the owner of Valley Motors. O'Neill testified that part of his business included wholesaling vehicles to dealers, including US Auto. Initially US Auto was a good company with which to do business, but then it stopped paying. O'Neill confronted petitioner on many occasions and she "always had a story as to what was going on." Those stories included, "We're waiting for a check," "[w]e're gonna have a whole bunch of money here shortly because [petitioner's husband] is collecting on a disability claim," "[w]e are getting over $100,000 back from the State Board because they miscalculated sales tax on vehicles they repossessed." US Auto had failed to

pay for approximately 30 of Valley Motors' vehicles. The total price that US Auto had agreed to pay but did not was $185,850.

A fourth wholesaler Benafield contacted was West Coast Motors (count 4). Gurpreet Dhatt was the owner of West Coast Motors. Dhatt testified that part of his business included wholesaling vehicles to US Auto. Over a two and one-half to three year period starting in June 2004, Dhatt did business with US Auto, selling it roughly 40 to 50 vehicles. Those vehicles were in the $7,000 to $12,000 range. There were 19 vehicles for which US Auto never paid. The amount he was owed from US Auto was "around $62,000," which excluded the value of "a lot of the smaller cars . . . [which he] couldn't track down and find out . . . what happened to."

Benafield also contacted lenders to ask if there were any vehicles to which they had not received title.

One of these lenders was County Financial (count 5). Benafield testified she contacted County Financial and "spoke with a gentleman." She "would be guessing if [she] were to give a name," although she "wan[ted to] say, like, Steve or something." Benafield "was not sure what his position was," although it was her general practice when contacting financial institutions to speak with the contact person "involving dealers and transactions with dealers." The gentleman said County Financial had financed cars for purchasers from US Auto. The gentleman told her County Financial had not received titles for any of those vehicles. Benafield testified about the specifics of four of those vehicle transactions, including the names of

purchaser, the make and model of the car, the date the purchaser bought the car, and the amount the purchaser financed. The amount for those vehicles totaled $50,735.60. The gentleman provided her with something "like a ledger that indicated the amount of money [County Financial] deposited in [US Auto's] accounts for the vehicles." The gentleman provided her a total amount that the company "felt" US Auto owed County Financial, but Benafield "couldn't [testify to that amount] right off the top of [her] head."

Another lender Benafield contacted was Credit West (count 6). Benafield testified she spoke to somebody she knew as "Brenda" and "believe[d] her name was Brenda Smith." Brenda told Benafield "they did have a few vehicles that were financed through US Auto." Benafield thought it was between three and five. Brenda said Credit West had not received title for any of those vehicles and they would not have financed these vehicles if Credit West thought it was not going to get the titles. Brenda said the person she dealt with at US Auto was "Maria Garza." In response to a request by Benafield, Credit West provided her with "some documentation of some sort." Benafield testified to the specifics of three of the vehicle transactions, including the names of purchaser, the make and model of the car, the date the purchaser bought the car, and the amount the purchaser financed. Brenda told her the amount of money US Auto owed Credit West (although Benafield did not testify as to what that amount was). Benafield did not know what the total of

those three vehicles added up to. But the total, based on the figures Benafield testified to in court, was $12,985.44.

In December 2007, Benafield arrested petitioner at a supermarket in Linden. Petitioner had $18,000 cash in her purse. Petitioner told Benafield she was the only one at US Auto who handled the banking. She had abandoned the business instead of closing it down. Lately, she had been cashing lenders' checks at local markets like Supermercado LA Amapola and La Tapatia instead of her prior practice, which had been cashing them at her business's bank, Bank of America. She had resorted to this practice because financial institutions had been holding the checks she deposited because the Board of Equalization had levied her accounts. Benafield and petitioner discussed the amount owed to each wholesaler, and petitioner acknowledged, "yes, she did understand that she owed them money." Petitioner explained that because she had filed for bankruptcy, she listed them as debtors in the bankruptcy filing. With the money she did have for her business, petitioner paid O'Neill of Valley Motors, US Auto's payroll, and personal household expenses like the electricity and cable bills and the mortgage payment. She also paid for her niece's Quinceañera. Petitioner told Benafield the number of vehicles she believed she still needed to pay title for, although Benafield could not recall what that number was.

According to Benafield's calculations, petitioner owed the wholesalers $370,945 and the lenders $280,152.46.

C

Decision Of Magistrate And Court Proceedings

Based on the foregoing evidence, the People argued petitioner should be held to answer for eight felony counts of grand theft. Petitioner argued that as to all of the counts, there was insufficient evidence of her intent to steal. She also argued that notwithstanding any evidence of her intent to steal, the five counts against her that were based on Benafield's testimony alone should have been dismissed because Benafield was improperly allowed (over repeated objections) to testify to hearsay from declarants who were not shown to have personal knowledge of the facts they alleged. The magistrate held petitioner to answer on all eight counts.

Petitioner then filed a Penal Code section 995 motion to dismiss the eight felony charges. In denying the Penal Code section 995 motion, the court stated its view that the hearsay objections petitioner made throughout the preliminary hearing went "to some of the procedural problems," but "they really don't -- aren't directed to the gravamen of the matter, and the hearsay objections in general . . . are not well-founded because under Penal Code section 872 most of this material could have been presented." The court's "biggest complaint about this whole thing [wa]s that the actual documents that support this whole thing were not presented. But I don't think that's actually necessary as long as the witnesses who were able to testify and authenticate those documents, were talked to by the investigator. It's a really thin way to do things. But

nevertheless, I think it is sufficient under Penal Code section 872."

Petitioner brought a writ petition in this court. In it, she renewed her contentions made in the trial court that: (1) as to five counts, the hearsay to which Benafield testified should have been stricken because there was no evidence the hearsay declarants had personal knowledge of the facts they related to Benafield; and (2) as to all eight counts the People presented insufficient evidence she took anything of value and she had the specific intent to steal. We issued an alternative writ.

As we will explain, petitioner is correct as to two counts only. The court should have dismissed counts 5 and 6 because the evidence to prove those counts was unreliable. But the court properly held petitioner to answer for the remaining counts because the evidence to prove those counts was reliable and supported by sufficient evidence of an actual taking and the specific intent to steal.

DISCUSSION

I

The Magistrate Properly Held Petitioner To Answer On Counts 1, 2, and 8 But Should Have Dismissed Counts 5 and 6

"Special rules apply to the admission of hearsay evidence at a preliminary hearing in a criminal case." (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 451.) These rules were enacted in June 1990 when Proposition 115 was adopted by the voters, which added the following language to the state

Constitution: "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process." (Cal. Const., art. I, § 30, subd. (b).) The proposition included a statutory provision directing that notwithstanding Evidence Code section 1200, which makes hearsay generally inadmissible, at a preliminary hearing "the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." (Pen. Code, § 872, subd. (b).) There is a limitation on this provision, however, that provides the only law enforcement officers qualified under this provision to testify regarding hearsay statements are those who "shall either have five years of law enforcement experience or have completed a training course . . . that includes training in the investigation and reporting of cases and testifying at preliminary hearings." (*Ibid.*)

In interpreting the provisions of Proposition 115, the California Supreme Court has stated that the testifying officer who is relating an out-of-court statement must have "sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072-1073.) The requirements in Penal Code section 872 of training and

experience are intended to enhance the reliability of the hearsay testimony, and "contemplate[] that the testifying officer will be capable of using his or her experience and expertise to assess the circumstances under which the [out-of-court] statement is made and to accurately describe those circumstances to the magistrate so as to increase the reliability of the underlying evidence." (*Whitman*, at p. 1074.)

Turning to the counts here, petitioner contends the problem with the five counts supported by Benafield's testimony was that the hearsay declarants (i.e., the people whose statements Benafield related) lacked personal knowledge regarding the transactions between their companies and US Auto. In making this argument, petitioner relies on *People v. Valencia* (2006) 146 Cal.App.4th 92, which reversed a defendant's molestation conviction that had been based on a hearsay statement that was admitted for the truth even though the declarant lacked personal knowledge of the truth of the declarant's own statement. (*Id.* at pp. 92, 103-104.)

We agree with petitioner's argument for counts 5 and 6, but disagree as to counts 1, 2, and 8. As we explain, the statements testified to by Benafield regarding the declarants in counts 1 and 2 were reliable because not only did the declarants have personal knowledge, Benafield was able to assess and describe the circumstances under which those statements were made. The statements regarding the declarant in count 8 were reliable because petitioner's own files demonstrated she had not transferred the pertinent titles. As we shall further explain,

the statements testified to by Benafield regarding the declarants in counts 5 and 6 were unreliable not only because the declarants lacked personal knowledge, but because Benafield was not able to describe in meaningful detail the circumstances under which those statements were made. We explain in detail these counts now.

As to counts 1 and 2, Benafield's testimony demonstrated that the hearsay declarants did have personal knowledge about their companies' financial dealings with US Auto and based on that knowledge, the position the declarants occupied in the company, and the details that Benafield was able to recount about her conversations with declarants, the statements they made were reliable.

As to count 1, the hearsay declarant was Jeff Brasher, the owner of vehicle wholesaler Brasher's Auto Auction. Benafield talked with Brasher who said US Auto had not paid him for $49,645 worth of cars to which Brasher still held title. Regardless of who prepared the list of vehicles documenting the cars Brasher had sold to US Auto, Brasher himself was able to tell Benafield about vehicles *he* had sold to US Auto and the amount of money US Auto failed to pay *him* and told her the data on the list was accurate. Based on Brasher's personal knowledge of the transactions and Benafield's detailed description of the conversation, this evidence was reliable.

The same can be said about count 2. The hearsay declarant was Mahmoud Daoud, the owner of vehicle wholesaler Northbay Motors. Similar to her conversation with Brasher, Benafield

talked directly with Daoud, who said *he* wholesaled eight vehicles to US Auto for which *he* had not been paid. While it was Daoud's accountant who prepared the list of those vehicles, on the phone it was Daoud himself who went vehicle by vehicle with Benafield and told her for how much *he* had sold each vehicle to US Auto. Daoud also said US Auto owed *him* $53,000. Again, based on Daoud's personal knowledge of the transactions and Benafield's detailed description of the conversation, this evidence was reliable.

Count 8 is a closer case, but on inspection survives as well. Benafield knew she was speaking to Mark Garaman who worked at Rudolph Inc., although she did not know his job title. He had a list of vehicles for which Rudolph Inc. did not have title and had the contracts between the consumer and US Auto for those cars and the consumers' canceled checks. While there was nothing to indicate Garaman had personal knowledge of the contents of the list or that he could relate how the list was created, the information he provided had indicia of reliability because of petitioner's own files. When Benafield first visited petitioner later in July 2007 to follow up on Rudolph Inc.'s complaint, petitioner said she could not speak about each of the cars individually because she did not have the files with her. They then scheduled a follow-up meeting for a month later, and it was at that meeting petitioner discussed what her files showed. At that meeting, petitioner's own files showed she had transferred only four of the at-issue titles pertaining to

Rudolph Inc. Petitioners own files, then, gave Garaman's statements the indicia of reliability.

In contrast, the hearsay statements in counts 5 and 6 lacked any meaningful indicia of reliability. As we explain, Benafield was unsure in some cases even who the hearsay declarants were and she provided little to no basis for establishing the declarants' basis of knowledge for the information the declarants relayed to her.[1]

As to count 5, Benafield spoke to a gentleman from County Financial whose name she did not know. She also did not know what position he occupied at the company. While he provided her with something "like a ledger" and a total amount County Financial "felt" it was owed by US Auto, nothing in these scant details demonstrated the basis of the gentleman's knowledge.

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[1] In discussing these counts, we keep in mind the business records exception to the hearsay rule (Evid. Code, § 1271) that states, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

There is nothing indicating these prerequisites were established during Benafield's testimony as to any of the counts. This did not matter as to counts 1 and 2 because the owners were testifying about their own personal knowledge. This also did not matter as to count 8 because petitioner's own files verified the data. This was not the case as to the two other counts.

Unlike the owners in counts 1 and 2, the gentleman did not appear to speak from personal knowledge of the transactions. Benafield's lack of understanding as to where the gentleman's knowledge came from and her failure to recollect even the most basic aspects of the conversation (i.e., the gentleman's name or position) demonstrated Benafield could not "meaningfully assist the magistrate in assessing the reliability of the statement[s]." (*Whitman v. Superior Court*, *supra*, 54 Cal.3d at pp. 1072-1073.) Moreover, unlike count 8, there was no evidence from another source that bolstered the reliability of the gentleman's hearsay statements. For example, there was no evidence that petitioner's own files supported the details of the transactions with County Financial about which the gentleman spoke with Benafield.

The same is true of count 6. Benafield knew for sure only that the first name of the person with whom she spoke at Credit West was Brenda. Benafield did not testify as to Brenda's position in the company. And similar to the gentleman from County Financial, Brenda provided Benafield with "some documentation of some sort," but nothing in these details demonstrated where Brenda acquired the knowledge about the transactions between Credit West and US Auto. Again, unlike the owners in counts 1 and 2, Brenda did not appear to speak from personal knowledge of the transactions. Moreover, just like with count 5, there was no evidence from petitioner's files as to details of her transactions with Credit West.

In short, as to counts 5 and 6, the circumstances under which the out-of-court statements were made to Benafield, including Benafield's inability to recount certain basic details about the declarants and how they acquired the knowledge made it such that Benafield as the investigating officer did not "meaningfully assist the magistrate in assessing the reliability of the statement[s]." (*Whitman v. Superior Court*, *supra*, 54 Cal.3d at pp. 1072-1073.) The magistrate therefore erred in holding petitioner to answer for these two counts.

II

There Was Sufficient Evidence Petitioner Stole From The Victims And She Had The Specific Intent To Do So

Petitioner contends the magistrate should not have held her to answer for any of the theft counts because there was insufficient evidence to support two elements of the crime -- taking property and specific intent to steal. (See *People v. Walther* (1968) 263 Cal.App.2d 310, 316 [the elements of grand theft "are the taking of personal property [exceeding $400 in value] from the owner, into the possession of the criminal without the consent of the owner or under a claim of right, the asportation of the subject matter, and by the specific intent to deprive the owner of his property wholly and permanently. The requisite intent may be shown circumstantially].")

As to taking property, petitioner argues that while she "might have, through her inactions, caused a misallocation of the bundle of rights, she held onto none of the rights that are bundled in the legal and physical possession of vehicles -- the

vehicles themselves were taken by the consumers and/or the financial institutions, while the titles remained vested in the wholesalers." While petitioner is correct she did not have the titles (the wholesalers did because they had not been paid) and she did not have the cars (the consumers did), petitioner fails to mention what she did have -- money that was not hers.

The reason the wholesalers would not sign over the titles to the lenders was because petitioner kept the money paid by the lenders. Benafield and petitioner discussed the amount owed to each wholesaler and petitioner acknowledged, "yes, she did understand that she owed them money." Petitioner told Benafield the number of vehicles she believed she still needed to pay title for, although Benafield could not recall what that number was. According to Benafield's calculations, petitioner owed the title holders (i.e., the wholesalers) $370,945, and she owned the lenders $280,152.46. This evidence of monetary loss to the wholesalers and lenders was sufficient to satisfy the taking element of grand theft.

Petitioner's argument as to the specific intent element fares no better. She argues she intended to reopen US Auto if she had been allowed to, and so taking the money without specifically intending to steal was not a violation of the statute. Petitioner ignores the circumstantial evidence supporting an inference she intended to steal from the wholesalers and lenders. When petitioner received money, she did not pay the wholesalers and lenders. Instead, she kept for herself $18,000 cash that was found in her purse and was using

money from US Auto for personal household expenses like electricity and cable bills, her mortgage payment, and for a niece's Quinceañera.

DISPOSITION

The clerk is directed to issue a writ of mandate compelling the superior court to vacate its prior order and to enter a new order granting petitioner's motion to set aside counts 5 and 6 of the information. The alternative writ is hereby discharged.

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

MAURO, J.